

IN THE SUPREME COURT OF MISSOURI

LAWRENCE MICKEY,	)	
	)	
Plaintiff- Respondent,	)	
	)	
v.	)	No. SC93591
	)	
BNSF RAILWAY COMPANY and	)	
SAFECO INSURANCE COMPANY	)	
OF AMERICA,	)	
	)	
Defendants-Appellants.	)	

**SUBSTITUTE BRIEF OF DEFENDANTS-APPELLANTS**

**BNSF RAILWAY COMPANY AND**

**SAFECO INSURANCE COMPANY OF AMERICA**

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## **JURISDICTIONAL STATEMENT**

This appeal involves the erroneous entry of judgment against the surety, Safeco, under Rule 81.11 of the Missouri Rules of Civil Procedure, based on the prior judgment against BNSF, and the failure of the trial court to enter full and complete satisfaction of judgment under Rule 74.11(c) of the Missouri Rules of Civil Procedure. As noted below, BNSF has paid to plaintiff the full amount of the judgment with costs and interest after withholding from the judgment and remitting to the U.S. Treasury the employee's portion of Railroad Retirement taxes and Medicare taxes due on the judgment as required pursuant to the Railroad Retirement Act, the Railroad Retirement Tax Act, Railroad Retirement Board regulations, and the Internal Revenue Code. The Court of Appeals had jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution, as this case did not involve one of the five areas subject to the exclusive jurisdiction of the Supreme Court of Missouri. However, by Order of October 1, 2013, the Supreme Court of Missouri sustained appellants' application for transfer after opinion and ordered the cause, ED98647, transferred to the Supreme Court of Missouri, which has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution.

## **STATEMENT OF FACTS**

### **I. Procedural Matters**

Plaintiff brought an action under Federal Employers' Liability Act (FELA), 45 U.S.C. §51 et seq., against his employer, BNSF, for personal injuries and damages that



included pay for time lost. The case was tried and on February 26, 2010. Judgment was entered upon the jury verdict in the amount of \$345,000.00. Per Order dated June 15, 2010, the trial court denied the motion for new trial, awarded taxable costs in the amount of \$3,730.90 and ordered post judgment interest at 5.19% per annum. The judgment was affirmed on appeal per opinion filed November 29, 2011. *Mickey v. BNSF Railway Company*, Missouri Court of Appeals, Eastern District, Appeal No. ED95110. (LF 26-36.) The Mandate from the Missouri Court of Appeals, Eastern District was received and filed March 23, 2012. (LF 37)

On March 22, 2012 Mickey was advised that BNSF desired to satisfy judgment and that the employee portion of RRB Tier 1 and Tier 2 taxes and Medicare taxes would be withheld from the judgment. See, E-mails of March 22, 2012 between William A. Brasher and Roger C. Denton, with attached documents. (LF 67-69)

Mickey advised that he “*disagree[d] that RRB taxes for Tier 1 and Tier 2 should be withheld and that any tender of money deducting these amounts is not a satisfaction of judgment.*” See, E-mails of March 22, 2012 between William A. Brasher and Roger C. Denton, with attached document, Satisfaction of Judgment. (LF 67-69)

On April 20, 2012, Mickey filed his Motion for Judgment on Supersedeas Bond, bringing the surety, Safeco Insurance Company of America, into the action. (LF 40-42) Under the supersedeas bond issued July 2, 2010, BNSF Railway Company is the principal and Safeco Insurance Company of America is the surety. See, Supersedeas Bond, Issued July 2, 2010. (LF 43-44)

On April 20, 2012, BNSF hand-delivered a check to plaintiff's attorneys in the amount of \$368,480.67, which reflected interest due as of that date (minus the \$12,820.80 in dispute), specifically noting on the check that this was in: "*Partial satisfaction of judgment and costs in the case of Lawrence Mickey vs. BNSF (MICKEL091407), Amount of \$12,820.80 withheld for RRB taxes.*" The only amount being withheld was the amount of \$12,820.80, which was the amount of disputed RRB and Medicare taxes. See, Letter dated April 20, 2012 from Thomas P. McDermott to Roger C. Denton with copy of check. (LF 81-83) Mickey cashed the check on April 25, 2012.

On May 11, 2012 there was a hearing before the trial court on Plaintiff's Motion for Judgment on the Supersedeas Bond and an order was entered, noting that the motion was called, heard and submitted. (LF 177)

While plaintiff's Motion for Judgment against Supersedeas Bond was pending and prior to the notice of the court's Order and Judgment of May 24, 2012, the \$12,820.80 representing Mickey's portion of RRB and Medicare taxes at issue in this case was processed and paid pursuant to the Railroad Retirement Tax Act and federal regulations. (LF 195-198)

On May 24, 2012 The trial court entered an Order and Judgment, ordering that plaintiff's motion for judgment on the supersedeas bond was granted and entering judgment in favor of plaintiff and against Safeco Insurance Company of America in the amount of \$12,820.80. (LF 178-180) (A001-A003)

On May 25, 2012 defendant BNSF and Safeco moved to vacate the Order and Judgment of May 24, 2012 and to modify the Order to show that judgment had been

satisfied due to the fact that the \$12,820.80 in employee RRB and Medicare taxes had been paid to the U.S. Treasury. (LF 181-194) The trial court denied the motion to vacate and modify per Order of June 8, 2012. (LF 209) (A005)

After the Judgment of May 24, 2012 became final, BNSF and Safeco timely filed Notice of Appeal on June 26, 2012.

## **II. Taxation Matters**

As an employee of BNSF, Mickey does not fall under the Social Security Act, but rather the Railroad Retirement Act (RRA), 45 USC § 231 et seq. and the Railroad Retirement Tax Act (RRTA) 26 USC §§3201-3241. See, Affidavit of Jennifer L. Frank, ¶¶ 11, 20. (LF 93, 95)

Railroad employees receive retirement benefits under the RRA which is funded by employer and employee contributions required by the RRTA. Under the RRTA the employee and employer portions of taxes are administered by the IRS and are paid to the U.S. Treasury. See, Affidavit of Jennifer L. Frank, ¶22. (LF 96)

RRTA employment taxes are divided into two tiers. Tier 1 taxes provide railroad employees the functional equivalent of Social Security benefits. Tier 1 and Medicare taxes are paid by both the railroad employee and the railroad employer. Tier 2 taxes fund an additional annuity payment made as an equivalent to a private pension benefit for railroad employees. Again, both the employee and railroad pay a portion of Tier 2 tax. See, Affidavit of Jennifer L. Frank ¶¶ 4-6. (LF 91)

In *Lawrence Mickey v. BNSF Railway Company*, Cause No. 0822-CC-01667, Circuit Court of the City of St. Louis, the judgment for \$345,000 was a general verdict,

all of which is considered as payment for time lost and was taxed accordingly. See, IRS Rev. Rul. 61-1 (1961). (LF 101) (A052) and 45 U.S.C. §231(h)(2). (LF 102-111) (A006-A015)

Mickey's Petition filed in the FELA case sought past and future lost wages and benefits per paragraph 5 of the Petition. See, Plaintiff's Petition filed in *Mickey, supra*. (LF 14-16) In addition, Mickey's trial testimony included damages for lost wages. See, Excerpts from trial transcript, *Mickey, supra*, p. 547:1-549:17. (LF 120) (A100) Mickey also testified regarding his employment status. See, Excerpts from trial transcript, *supra*, p. 593:6 to 594:14. (LF 121) (A101) Mickey's attorney also included past and future lost wages and benefits in his closing argument. See, Excerpts from trial transcript, *supra*, p. 925:20-928:9. (LF 122-123) (A102-103)

Accordingly, under the RRA and the RRTA laws and their application by IRS and RRB, the judgment of \$345,000 in *Mickey, supra*, was taxable as compensation under the Railroad Retirement Act. The employee portion of Tier 1, Tier 2 and Medicare taxes as required by law were deducted by the employer and paid to the to the U.S. Treasury under the Railroad Retirement Tax Act. Pursuant to the RRTA the employee and employer portions of taxes are paid to the IRS by the employer. See, Railroad Retirement Tax Act (RRTA) 26 USC §§3201-3241. (LF 145-164) (A016-A035) RRTA, 26 U.S.C. §3202. (LF 147) (A018) See, Affidavit of Jennifer L. Frank, ¶¶ 5, 6, 20. (LF 91, 95) Even if BNSF does not withhold the taxes from the employee's compensation, it must still pay them to the IRS. 26 U.S.C. §3202 (b). (LF 147) (A018)

Under the RRTA, BNSF was required to withhold from the employee's compensation the employee-funded portion of the RRTA taxes, which the railroad must then pay directly to the IRS, along with its employer-funded portion of those taxes.

BNSF completed and submitted the required RRB Form BA-3 for Lawrence Mickey, submitted for the year 2012, the year in which payment of the judgment was made. Form BA-3 showed the maximum amount that could be taxed for RRA Tier 1, \$110,10000, and for RRA Tier 2, \$81,900.00. See, RRB Form BA-3 for Lawrence Mickey. (LF 98) See, Affidavit of Jennifer L. Frank, ¶24. (LF 96)

Additionally, BNSF completed and filed RRB Form BA-4, showing allocation of lost wages for specific months in the years 2008 and 2009 for purposes of the Railroad Unemployment Insurance Act (RUIA). Form BA-4 also shows the amount taxed under the RUIA, which is a separate tax from Tier 1, Tier 2 and Medicare. RUIA taxes are paid by the employer only. See, RRB Form BA-4 for Lawrence Mickey, submitted 4/2012, Second Amendment. (LF 99) See, Affidavit of Jennifer L. Frank, ¶14-16. (LF 94-95)

BNSF was required by law to: (1) report the verdict and judgment to the RRB and allocate the monies to time lost in the past, (2) withhold and pay the IRS the employee's share of Tier 1, Tier 2, and Medicare taxes, and (3) pay the IRS the employer's share of plaintiff's Tier 1, Tier 2, and Medicare taxes on the award. As to the **employee** portion specifically, applying the 2012 rates, BNSF was required to withhold and pay the following:

Tier 1: (4.2% of paid compensation up to \$110,100)	\$4,624.20
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Tier 2: (3.9% of paid compensation up to \$81,900)	\$3,194.10
Medicare: (1.45% of compensation, \$345,000)	\$5,002.50
Total:	\$12,820.80

See, Affidavit of Jennifer L. Frank, ¶6. (LF 91)

The employee portion of RRB taxes to be withheld from the verdict were: \$4,624.20 in RRB Tier 1 taxes; \$3,194.10 in RRB Tier 2 taxes and \$5,002.50 in Medicare taxes, in the total amount of \$12,820.80. See, Affidavit of Jennifer L. Frank, ¶6. (LF 91) BNSF withheld the employee portion of those taxes in the amount of \$12,820.80 and paid them to the U.S. Treasury. (LF 195-199)

BNSF also paid the employer's portion of the RRB Tier 1 and Tier 2 and Medicare taxes on the maximum taxable amounts reported on Form BA-3. BNSF has paid the following as the **employer's** portion of the RRTA taxes: \$6,826.20 (Tier 1), \$5,002.50 (Medicare) and \$9,909.90 (Tier 2) for a total of \$21,738.60. The employer's portion was paid by BNSF **in addition to** the judgment. This amount was not withheld from the judgment. See, Deposit Confirmation, Employer Federal Tax Payment System, Settlement Date 05/02/2012. (LF 100) See, Affidavit of Jennifer L. Frank, ¶25. (LF 96)

Mickey disputed that taxes in the amount of \$12,820.80, representing the employee portion of Tier 1, Tier 2 and Medicare taxes, must be deducted from the judgment and paid to the IRS under the Railroad Retirement Tax Act. Mickey asserted that the \$12,820.80 must be paid to him in satisfaction of judgment.

Under the RRTA, the employee and employer portions of taxes under the RRA are administered by the IRS and paid to the U.S. Treasury. BNSF complied with the

reporting requirements of the RRA and RRTA in reporting the judgment of \$345,000 as payment for time lost; in withholding and paying the amount of the employee's portion of RRB and Medicare taxes thereon; and in paying the employer's portion of RRB and Medicare taxes thereon as required by federal law and regulations.

### POINT RELIED ON

**I. The trial court erred in entering judgment against the surety on the supersedeas bond as BNSF had already satisfied judgment by paying to plaintiff the full amount due on the judgment, including costs assessed and interest, while plaintiff's motion improperly sought to recover the employee's portion of RRB Tier 1, Tier 2, and Medicare taxes due on the judgment as pay for time lost and which BNSF withheld and paid to the U.S. Treasury on plaintiff's behalf as required under federal laws and regulations while the trial court's order and judgment resulted in a windfall, double recovery by plaintiff of taxes BNSF had withheld and paid on plaintiff's behalf.**

*McDonald v. McDonald*, 795 S.W.2d 626 (Mo.App. 1990)

*Hance v. Norfolk Southern Railway Co.*, 571 F.3d 511 (6th Cir. 2009)

*Heckman v. Burlington Northern Santa Fe Railway Company*, 286 Neb. 453, --- N.W.2d

--- (2013), 2013 WL 4541620 (Neb.)

*Cheetham v. CSX Transp.*, 2012 WL 1424168 (M.D. Fla.)

Railroad Retirement Tax Act (RRTA) 26 USC §§3201-3241.

## ARGUMENT

**I. The trial court erred in entering judgment against the surety on the supersedeas bond as BNSF had already satisfied judgment by paying to plaintiff the full amount due on the judgment, including costs assessed and interest, while plaintiff's motion for judgment on the supersedeas bond improperly sought to recover the employee's portion of RRB Tier 1, Tier 2, and Medicare taxes due on the judgment as pay for time lost and which BNSF withheld and paid to the U.S. Treasury on plaintiff's behalf as required under federal laws and regulations while the trial court's order and judgment resulted in a windfall, double recovery by plaintiff of taxes BNSF had withheld and paid on plaintiff's behalf.**

### Standard of Review

This appeal involves the issue as to whether there is satisfaction of judgment when the judgment, costs and interest have been paid to plaintiff and the employee's portion of RRB taxes and Medicare taxes have been withheld from the judgment and paid to the U.S. Treasury as required under federal law and regulations. These laws and regulations require the railroad employer to withhold and pay the employee's portion of Tier 1, Tier 2 and Medicare taxes from any judgment that includes pay for time lost. Accordingly, this appeal involves the interpretation and application of these statutes and related laws and regulations. The standard of review for an appeal challenging the interpretation and application of a statute is de novo: "Accordingly, we review the trial court's judgment independently, without deference to the trial court's conclusions. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc



1993).” *Johnson v. BFI Waste Sys. of N. Am., Inc.*, 162 S.W.3d 127, 129 (Mo. Ct. App. 2005).

**A. The trial court erred in failing to enter satisfaction of judgment in accordance with the prior mandate once BNSF had made full payment of the judgment with costs and interest less the employee’s portion of Railroad Retirement and Medicare taxes BNSF was required to withhold and remit pursuant to federal law and regulations.**

In the Order of May 24, 2012 the trial court stated: “*Where a judgment is appealed and affirmed, a trial court has no authority after the mandate to make any orders or determinations other than those that are necessary to execute the judgment.*” (LF 179) The trial court also cited three cases in support. However, none of those cases involve facts or circumstances applicable to this case.

In *Pope v. Ray*, 298 S.W.3d 53 (Mo.App. 2009) the Court of Appeals had remanded the case for a new trial on the issue of damages. On remand the trial court applied a prior arbitration award to one of the defendants rather than conduct a new trial on the issue of damages. The judgment was reversed with the case remanded to follow the original mandate to conduct a new trial on the issue of damages. In this case, there was no mandate for a new trial or any other such instructions. The taxation of the judgment is independent of any determination of the judgment and operates as a matter of federal tax law and regulations.

In *Vanderford v. Cameron Mut. Ins. Co.*, 915 S.W.2d 391 (Mo.App. 1996) the appellate court affirmed the judgment of the jury, which included an award of attorney

fees for trial. The verdict was appealed but not the award of attorney fees. The appellate court affirmed the verdict. When plaintiff sought attorney fees for the appeal the trial court refused, stating that the mandate did not include any provision for attorney fees. When plaintiff appealed that decision plaintiff was denied. Plaintiff failed to seek such attorney fees in the trial court. Accordingly, the remand from court of appeals did not include attorney fees on appeal.

Likewise, in *Papin v. Papin*, 475 S.W.2d 73 (Mo. 1972) defendants sought attorney fees only after the mandate from the Supreme Court of Missouri had been handed down. Defendants had not sought attorney fees in their petition or at trial. Accordingly, attorney fees were not allowed after the mandate.

The issues in the cases cited by the trial court involve attorney fees and other issues that were subject to the mandate of the appellate court or governed by the pleadings. In this case, the issue of taxation of the judgment is a matter of federal laws and regulations independent of the trial court and the mandate from the appellate court. Accordingly, the mandate was not in conflict with the operation of federal tax laws.

Contrary to the trial court's belief, recognizing the withholding and payment of RRB and Medicare taxes was, in fact, subject to his authority and not inconsistent with the mandate from the appellate court. As the trial court noted: "*The Court believes it has no authority to find that the judgment in this case has been satisfied upon payment by defendant to plaintiff of less than the full amount of the judgment plus post judgment interest, ...*". The withholding and payment of the employee's portion of Railroad Retirement taxes and Medicare taxes does not derive from the authority of the trial court

or the mandate from the court of appeals. Federal law, specifically the RRTA, the RRA, and applicable regulations, require that BNSF withhold and pay the employee's portion of taxes on payment of the judgment independent of the trial court. Plaintiff cannot seek to avoid the federal tax consequences of payment of the judgment by seeking judgment against the surety for the amount of taxes he is required to pay under federal law.

Any judgment is potentially subject to the operation of liens and tax laws independent of the judgment. By extension of the trial court's logic, no defendant could ever satisfy a lien or comply with any tax laws affecting the judgment. A defendant who complied with payment of a medical lien or complied with the Medicare Secondary Payer Act would be in jeopardy of double payment, once to satisfy the lien or tax liability and again to satisfy the judgment. The trial court missed the point. By withholding and remitting plaintiff's portion of RRB and Medicare taxes, as required by federal law, defendant was satisfying judgment. This was not contrary to the mandate of the appellate court, but rather in fulfillment of the mandate and federal tax laws. The trial court has the power to enter a satisfaction of judgment that takes into account payment of the judgment with costs and interest and compliance with federal tax laws. As this Court has stated:

The circuit court, on remand, has the authority to enter a judgment consistent with the opinion and the mandate. "This connotes the power to make all necessary rulings on undisposed points." *Noll v. Shelter Ins. Companies*, 774 S.W.2d 147, 150 (Mo. banc 1989). This flexibility is required because the mandates and opinions of this court are not self-executing. *Durwood v. Dubinsky*, 361 S.W.2d 779 (Mo.1962).

*McDonald v. McDonald*, 795 S.W.2d 626, 628 (Mo.App. 1990).

Plaintiff does not receive less than the full amount of the judgment. The employee's portion of Railroad Retirement taxes and Medicare taxes were due and owing upon payment of the judgment. As the employer, BNSF was obligated to withhold and pay the employee's portion of Railroad Retirement taxes and Medicare taxes. Plaintiff would have BNSF ignore its duties and responsibilities under the Railroad Retirement Tax Act and make double payment of the employee's portion, once to plaintiff and again to the U.S. Treasury. Further, as a consequence of the tax laws BNSF also has to pay the employer's portion of taxes Railroad Retirement and Medicare taxes **in addition to the judgment.**

The trial court would have acted within the mandate of the appellate court by entering satisfaction of judgment in this case after BNSF had paid plaintiff the full amount of judgment, including costs and interest, less the employee's portion of Railroad Retirement and Medicare taxes remitted to the U.S. Treasury as required by the Railroad Retirement Act, the Railroad Retirement Tax Act, and applicable regulations. The trial court erred when it granted plaintiff's motion for judgment of the amount of taxes against the surety, Safeco, and failed to enter satisfaction of judgment.

**B. The judgment entered upon the verdict in this case is taxable as pay for time lost under Railroad Retirement tax laws and regulations and the amount of \$12,820.80 withheld from the judgment in this case constitutes the employee's portion of RRB and Medicare taxes on the judgment payable to the IRS by operation of federal law.**

It has long been settled that questions concerning the measure of damages in an FELA action are federal in character. This is true even if the action is brought in state court. *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 493, 100 S. Ct. 755, 757, 62 L. Ed. 2d 689 (1980). Federal substantive law governs all aspects of Plaintiff's claim under the FELA, 45 U.S.C. § 51 et seq., *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 491 (1916); *St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. 409 (1985), as well as the parties' obligations under the Railroad Retirement Act (RRA), Railroad Retirement Tax Act (RRTA), Railroad Retirement Board (RRB) regulations and Internal Revenue Code, which impact a judgment for Plaintiff which includes past or future wage loss.

Similar to Social Security, the railroad and its employees are subject to the Railroad Retirement Act and Railroad Retirement Tax Act and are required to pay Railroad Retirement taxes in lieu of Social Security taxes. *Hance v. Norfolk Southern Railway Co.*, 571 F.3d 511, 522 (6th Cir. 2009). In the event of a verdict for Plaintiff federal law treats the wage loss portion of the judgment as creditable service income for Railroad Retirement purposes. As a result, BNSF must report satisfaction of the judgment to the RRB and allocate the wage loss to the past period of time the employee was off work due to his alleged injury **and** to future months. Defendant must also report the wage loss portion of the judgment as payment for time lost and withhold the employee's portion of applicable RRB and Medicare tax obligations due on Plaintiff's judgment

when satisfied and remit the taxes directly to the U.S. Treasury<sup>1</sup>. It is important to note that, despite these regulations, an award to Plaintiff is not subject to federal or state income taxes.

The Railroad Retirement Act (RRA), the Railroad Retirement Tax Act (RRTA) and the Railroad Unemployment Insurance Act (RUIA) are all consistent and clear in their treatment of pay for time lost. The judgment entered upon the verdict in this case is considered pay for time lost and is taxed accordingly. BNSF was obligated to and did withhold the employee's portion of RRB and Medicare taxes from any payment for time lost. BNSF complied with the reporting requirements and withheld the employee's portion in the amount of \$12,820.80. BNSF paid the employee portion of Tier 1, Tier 2, and Medicare taxes in the amount of \$12,820.80 to the U.S. Treasury. BNSF also complied with the reporting requirements of the RRA and RRTA and paid all of the employer's taxes due under those laws. BNSF reported the taxable amounts under the RUIA and paid those taxes. The employee's portion of RRB and Medicare taxes withheld by BNSF and payable by Mickey are determined by federal law and regulations. This is not a matter of set-offs under state laws, but rather is determined by federal law.

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<sup>1</sup> The tax is withheld up to the maximum rates in effect at the time of satisfaction and only for the year in which payment is made. BNSF is also required to pay the employer's portion of taxes due on those amounts. The employer's portion paid by BNSF's is not an offset of any award Plaintiff receives. BNSF's portion is in addition to the judgment.

Under the Railroad Retirement Act, 45 U.S.C. §231(h)(2), payment for time lost on account of personal injury is considered compensation unless the payment is apportioned to factors other than time lost at the time payment is made. Unless the payment is apportioned to factors other than time lost, **the entire payment is considered paid for time lost:**

**An employee shall be deemed to be paid “for time lost” the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.**

45 U.S.C. §231(h)(2). [Emphasis added] (LF 108)

Further, under the Railroad Unemployment Insurance Act (RUIA), and regulations issued thereunder, pay for time lost is considered creditable compensation in the same manner as under the RRA. As explained by Chief Counsel to the RRB, Steven A. Bartholow, in a letter dated June 23, 2010, RRB regulations define pay for time lost as creditable compensation and include pay received for time lost due to personal injuries:

The Railroad Unemployment Insurance Act, at section 1(i)(1) provides essentially the same definition with respect to compensation creditable for benefit entitlement purposes under that Act as well. In addition, regulations of the Board (20 CFR 211.3(a)(1)) further define pay for time lost:

(a) A payment made to an employee for a period during which the employee was absent from the active service of the employer is considered to be pay for time lost and is, therefore, creditable compensation. Pay for time lost as an employee includes

**(1) pay received for a certain period of time due to personal injury \*\*\***

(2) ... In reporting compensation which represents pay for time lost, employer shall allocate the amount paid to the employee to the month(s) in which the time was actually lost. The entire amount of any payment made to an employee for personal injury is considered pay for time lost unless, at the time of payment, the employer states that a particular amount of the payment was for reasons other than pay for time lost.

RRB Letter, L-2010-04, June 23, 2010, Steven A. Bartholow. (LF 141-144)  
(A044-A047)

As a result, the employer is required to pay RUIA taxes for those months credited, in addition to paying the employer's, and withholding the employee's, RRB and Medicare taxes on personal injury judgment.



RRB considers judgments in lawsuits under the FELA to be pay for time lost and *“absent a specific allocation amount, or a specific award amount for losses other than earnings, the RRB will consider the entire amount of damages to be pay for time lost”* per its publication, RRB Information Notice, May 2011, Railroad Retirement Service Credits and Pay for Time Lost. See, RRB Information Notice, May 2011, Railroad Retirement Service Credits and Pay for Time Lost. (LF 112-115) (A048-A051)

The RRB publication also makes clear the method of computation:

4. Is pay for time lost subject to railroad retirement tier I and tier II payroll taxes and/or employer contributions under the Railroad Unemployment Insurance Act?

**Yes. As with all compensation, pay for time lost is subject to taxation under the Railroad Retirement Tax Act at the tier I and tier II tax rates and annual maximum earnings bases in effect when payment is made.** Pay for time lost is not, however, creditable on the basis of when the payment is made, but to the period for which the payment is allocated. Therefore, the taxable amount and creditable amount will sometimes differ. **The employees’ portion of the railroad retirement tax liability is usually withheld from the gross amount of the award.**

See Exhibit 15, RRB Information Notice, May 2011, Railroad Retirement Service Credits and Pay for Time Lost. [Emphasis added.] (LF 112-115) (A048-A051)

It is undisputed that any award under the FELA is not subject to federal income tax under *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490 (1980). However, income taxes are distinct from taxes under the Railroad Retirement Act (RRA) and Railroad Retirement Tax Act (RRTA). The IRS has long recognized that “time lost payments” are excludable from gross income under the tax code but that “time lost payments” constitute compensation for the purpose of taxes imposed by the Railroad Retirement Tax Act per IRS Rev. Rul. 61-1 (1961):

In the instant case, it is held that the amount received by the taxpayer was in settlement of any and all claims which he had against the railroad for the personal injuries he sustained and is, therefore, excludable from gross income under section 104(a)(2) of the Code. **The fact that in this case “time lost payments” constitute compensation for the purposes of taxes imposed by the Railroad Retirement Tax Act is not controlling for Federal income tax purposes.**

See, IRS Rev. Rul. 61-1 (1961). [Emphasis added.] (LF 101) (A052)

The Railroad Retirement Act (RRA), the Railroad Retirement Tax Act (RRTA) and the Railroad Unemployment Insurance Act (RUIA) are all consistent and clear in their treatment of pay for time lost. The judgment in this case is considered pay for time lost and is taxed accordingly. Any effort by Mickey to assert the non-taxability of FELA awards for federal income tax purposes has no bearing on the obligation of BNSF to withhold RRB and Medicare taxes on the award under the RRTA and RUIA.

**C. Under applicable law and regulations, BNSF is liable to the IRS for withholding and payment of employee taxes and indemnified as to third parties for the amount of taxes withheld and paid. If Mickey does not agree with the withholding and payment of the employee portion of RRB and Medicare taxes under the Railroad Retirement Tax Act, his recourse is to seek a refund from the IRS.**

At the time of satisfaction of judgment the railroad employer is required to withhold and make payment of the employee's portion of RRB and Medicare taxes to the IRS. In doing so, the railroad employer is not liable to plaintiff or any other party for the withholding and payment of such taxes under federal laws and regulations, in particular 26 U.S.C. §3202(b) and 26 U.S.C. §3102(b). Accordingly, BNSF is not liable to Mickey or any other party for such taxes withheld and paid.

Under 26 U.S.C. §3202(b) the employer is indemnified for taxes withheld and paid pursuant to the RRTA:

**(b) Indemnification of employer.**

Every employer required under subsection (a) to deduct the tax shall be liable for the payment of such tax and **shall not be liable to any person for the amount of any such payment.**

26 U.S.C. §3202(b).

The taxes required by subsection (a) of 26 U.S.C. §3202, are the taxes imposed by 26 U.S.C. §3201 of the RRTA, in particular RRB Tier 1 and Tier 2 taxes.

In addition, treasury regulations not only make the employer liable for the employee tax for compensation paid by him, but also protect the employer who deducts the employee tax from liability to other persons for the amount withheld:

**(e) Employer's liability. The employer is liable for the employee tax with respect to compensation paid by him, whether or not collected from the employee.** If the employer deducts less than the correct amount of employee tax or fails to deduct any part of the tax, he is nevertheless liable for the correct amount of the tax. Until collected from him, the employee is also liable for the employee tax. Any employee tax collected by or on behalf of an employer is a special fund in trust for the United States. See section 7501. **An employer is not liable to any person for the amount of the employee tax deducted by him and paid to the district director.**

26 CFR §31.3202-1(e) Collection of, and liability for, employee tax.

[Emphasis added.]

These Treasury regulations under the RRTA follow the statutory provisions of the RRTA, contained in 26 U.S.C. §3202(b).

Likewise, Medicare taxes are required to be withheld under the provisions of 26 U.S.C. §3101. There is similar language indemnifying the employer for withholding and payment of Medicare taxes:

**(b) Indemnification of employer**

Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

26 U.S.C. §3102(b).

**D. In addition to federal law and regulations, there is also case law recognizing the deduction of RRB and Medicare taxes from a jury verdict for lost wages.**

Deducting the amount of RRB and Medicare taxes due on the judgment for lost wages under the Railroad Retirement Tax Act and paying that amount to the IRS has been considered and upheld in the FELA case of *David C. Nielsen v. BNSF Railway Co.*, Circuit Court of the State of Oregon for the County of Multnomah, Case No. 0807-10580. *See*, Order Granting Defendant's Motion to Satisfy Award, March 5, 2012, *David C. Nielsen v. BNSF Railway Co.*, Circuit Court of the State of Oregon for the County of Multnomah, Case No. 0807-10580. (LF 135-136) (A053-054) In *Nielsen*, *supra*, only the portion of the judgment awarded as lost wages was subject to employment taxes. (LF 135-136) (A053-A054) As set forth in Defendant's ORS 18.235 Motion to Satisfy Money Award, there was a judgment for \$614,750, \$364,750 of which constituted lost wages. (A055-A061) The amount of \$12,863.28, the employee's portion of RRB and Medicare taxes were withheld only on that portion of the judgment for lost wages. (A060) The remainder of the judgment was not subject to RRB and Medicare taxes. Payment of the judgment minus the RRB and Medicare taxes on that portion of the verdict awarded as lost wages was proper and the judgment was satisfied. The court ordered satisfaction of

judgment under Oregon law, concluding that the deduction and payment from the judgment were required by federal law and were appropriate. As the Circuit Court noted in its Order:

“The court concludes that the award is income within the meaning of the RRTA, and that the deduction and payment to the IRS of the \$12,863.28 is [sic] required by federal law and that, therefore, a satisfaction of judgment is appropriate.”

*David C. Nielsen v. BNSF Railway Co.*, Circuit Court of the State of Oregon for the County of Multnomah, Case No. 0807-10580, Order Granting Defendant’s Motion to Satisfy Award, March 5, 2012, p. 2. (LF 136) (A054)

The Order of the Circuit Court in *Nielsen* was provided to plaintiff as an attachment to the e-mail on March 22, 2012. See, E-mails of March 22, 2012 between William A. Brasher and Roger C. Denton, with attached documents. (LF 70-73) The Order in *Nielsen* was also provided to the trial court as an exhibit to defendant’s response to plaintiff’s motion for judgment on the supersedeas bond. (LF 135-136) (A053-A054)

In *Phillips v. Chicago, Central & Pacific Railroad Company*, No. 04781 LACV 098439 (Iowa District Court for Pottawattamie County, Order on Defendant’s Motion for Satisfaction and Discharge of Judgment, April 12, 2013) (A071-A077) there was a

**general verdict** for plaintiff in an FELA claim.<sup>2</sup> The same issues related to RRB and Medicare taxation and satisfaction of judgment were presented in *Phillips* when the railroad tried to satisfy judgment by payment of the verdict less the employee's RRB and Medicare taxes. Defendant subsequently filed a motion for satisfaction and discharge of judgment arguing that it was proper to withhold the employee's portion of the RRB and Medicare taxes from the judgment amount.

The Iowa District Court considered the issue of “*whether an employer may withhold a portion of Plaintiff's general verdict award to pay Retirement Tax Act Payroll taxes.*” *Phillips*, supra, p. 2. After reviewing the same statutes and case law cited by appellants in this appeal, the Iowa District Court concluded “*time lost to be taxable compensation for purposes of the Railroad Retirement Tax Act.*” *Phillips*, supra, at p. 4. (A074.) Further, the Iowa District Court held that the entire judgment was deemed payment for time lost unless part of the judgment was apportioned to other factors. However, the general verdict was not apportioned. Evidence at trial supported the conclusion that at least some portion of the verdict award was for time lost. Accordingly, “*the entire verdict award shall be considered time lost for taxation under the Railroad Retirement Taxation Act.*” *Phillips*, supra, at 5. (A075.) With evidence at trial of time

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<sup>2</sup> Appellants advised the Missouri Court of Appeals of the order in a letter to the Clerk, dated June 3, 2013. (A069-A070)

lost, the court in *Phillips* concluded that the general verdict was deemed payment for time lost and taxable under the RRTA.<sup>3</sup>

Contrary to the opinion of the Missouri Court of Appeals herein, *Mickey v. BNSF R. Co.*, 2013 WL 2489832, \*6 (Mo.App.) (A097), the Iowa District Court in *Phillips*, *supra*, did **not** “apportion damages to a specific category (“time lost”) after the judgment was final”, but rather the Iowa District Court noted that the evidence presented at trial included evidence of lost wages. Following federal law, which deemed the entire verdict as pay for time lost, the Iowa trial court held that there was satisfaction of judgment upon payment of the judgment to plaintiff and withholding and payment of the RRB and Medicare taxes due on the judgment to the U.S. Treasury.

Similarly, in *Mickey*, upon defendant’s motion for satisfaction of judgment, the trial court was asked to note that plaintiff presented evidence of pay for time lost at trial. The entire amount of the judgment was deemed pay for time lost and taxable by operation of federal law, independent of the verdict and judgment of the trial court and the mandate of the court of appeals. There was no post-judgment apportionment of damages awarded in a general verdict. Defendant paid plaintiff the entire amount of judgment, with costs and interest, except for \$12,820.80, the employee’s portion of RRB

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<sup>3</sup> Plaintiff appealed the decision of the trial court regarding satisfaction of judgment. The appeal is pending in the Iowa Supreme Court, *Phillips v. Chicago, Central & Pacific Railroad*, Docket No.: 13-0729.



and Medicare taxes withheld from the judgment and paid to the U.S. Treasury. The trial court erred in failing to enter satisfaction of judgment in *Mickey*.

In *Heckman v. Burlington Northern Santa Fe Railway Company*, 286 Neb. 453, --- N.W.2d --- (2013), 2013 WL 4541620 (Neb.) the Nebraska Supreme Court upheld the satisfaction of judgment upon payment of the general verdict to plaintiff and the withholding and payment of the Railroad Retirement Taxes and Medicare Taxes due on the judgment to the U.S. Treasury. The Nebraska Supreme Court held that federal law means just what it says – when there is a general verdict with evidence of pay for time lost the entire general verdict is deemed pay for time lost, thus taxable. The employer is obliged to withhold and pay the employee’s portion of RRB and Medicare taxes to the U.S. Treasury. (A080-A089.)<sup>4</sup>

The opinion in *Heckman, supra*, is directly relevant as it involved the same issue on appeal in this case. In *Heckman*, as in *Mickey*, there was a general verdict that included pay for time lost. Accordingly, the Nebraska Supreme Court followed federal law and held that the general verdict was deemed pay for time lost and that the entire verdict was taxable. There was satisfaction of judgment in *Heckman* upon payment of the

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<sup>4</sup> On August 16, 2013 while the appellants’ application for transfer to the Missouri Supreme Court was pending, the Nebraska Supreme Court filed its opinion in *Eddie Heckman, Appellee, v. Burlington Northern Santa Fe Railway Company, No. S-12-335, Appellant*. Counsel for appellants herein advised the Missouri Supreme Court of the opinion in a letter to the Clerk, dated August 19, 2013. (A078-A079)

verdict to plaintiff minus the employee's portion of RRB and Medicare taxes, which were withheld and paid to the U.S. Treasury. *Heckman* also discussed the opinion of the Missouri Court of Appeals, Eastern District, in *Mickey v. BNSF Railway Co. et al.*, ED98647, June 11, 2013, which was the subject of the application for transfer to the Missouri Supreme Court.

Missouri law also requires a general verdict: "*Section 510.230, RSMo 1959, V.A.M.S. and Civil Rule 71.02, V.A.M.R., provide for the rendition of a general verdict; i.e., a finding or pronouncement by the jury on all issues submitted to it including that of damages.*" *Robinson v. Southwestern Bell Tel. Co.*, 434 S.W.2d 249, 251 (Mo.App. 1968). Missouri's requirement of a general verdict in claims for money damages does not somehow exempt verdicts in FELA claims from RRB and Medicare taxation. The federal law, specifically 45 U.S.C. §231(h)(2), applies to general verdicts. If there is evidence of lost wages at trial, the entire verdict and judgment is deemed pay for time lost. This law has been applied in *Phillips* and *Heckman*, in which there were general verdicts with evidence of pay for time lost presented at trial. These state courts applied federal law and entered satisfaction of judgment when plaintiff had been paid the judgment and the employee's portion of RRB and Medicare taxes were withheld from the judgment and paid to the U.S. Treasury. Missouri's requirement of a general verdict law does not prevent the uniform application of federal law to the taxability of verdicts and judgments under the RRTA.

Other courts support the withholding of employment taxes on judgments. In *Cheetham v. CSX Transp.*, 2012 WL 1424168 (M.D. Fla.) (Slip Copy) (A062-A068) the

issues involved whether an award for lost wages under the Family Medical Leave Act (FMLA) was taxable as income and subject to income tax and employment taxes under the Railroad Retirement Tax Act and whether CSX, as the employer, would be liable for failure to withhold taxes if it paid the full amount awarded without withholding the taxes. As in this case, plaintiff objected to any portion of the award being subjected to income and employment taxes and sought a Writ of Execution for the entire amount of the judgment without any deductions for any taxes. (In the instant case, plaintiff sought judgment on the supersedeas bond, including the amount withheld and paid as the employee's portion of RRB and Medicare taxes.) In *Cheetham* the court invited the Commissioner of Internal Revenue to file an amicus curiae brief as to the taxability of the damages equal to lost wages under the FMLA and whether CSX would be liable for failure to withhold necessary taxes if it paid the full amount without deductions. In holding that the lost wages were taxable and that the taxes were properly withheld by CSX, the court relied heavily on the amicus brief and cited it at length in its opinion:

Plaintiff's interpretation of the FMLA damages provision would also place Defendant in an unfair position. Defendant argues if it is ordered to pay the entire \$199,056 without any deductions, it could be liable to the IRS for failing to withhold necessary taxes. The United States agreed that if Defendant fails to withhold the federal taxes due on the damages award, it would be liable to the government for those taxes, unless it could demonstrate that Plaintiff included the damages award on her income tax return and paid the taxes due. **This could leave Defendant in the position**

**of potentially paying the same amount twice—once to Plaintiff and once to the IRS.**

As the United States explained,

**An employer is liable to the Government for [income and RRTA] taxes, whether or not it collects them from its employees’ wages.** 26 U.S.C. § 3403, titled “Liability for Tax,” states that “[t]he employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter,” and the corresponding Treasury Regulation states that **the employer “is liable for the payment of such tax whether or not it is collected from the employee by the employer.”** Treas. Reg. § 31–3403–1.<sup>7</sup> In fact, an individual employer (or a “responsible person” of a corporate employer) who fails to withhold FICA and income taxes from the wages of his employees, or who fails to pay those withheld taxes over to the Government, can be held personally liable for a penalty under 26 U.S.C. § 6672 that is equal to the amount that should have been withheld and paid over.

**\*8** An employer is not liable for the tax owed if the tax it failed to withhold is later paid, but, even then, the employer is not relieved of liability for any applicable penalties or other additions. 26 U.S.C. § 3402(d). Moreover, to be relieved of liability for that tax, the employer must show that the tax has been paid. Treas. Reg. § 31.3402(d)–1. **Thus, an employer (such as CSX here) will not be relieved of liability for**

**withholding taxes unless it can show that the taxes have been paid, and even then it will still be liable for applicable penalties and other statutory additions.**

(Doc. # 325 at 10).

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<sup>7</sup> **Likewise, a railroad employer is liable for the RRTA tax “whether or not collected from the employee.”** Treas. Reg. § 31.3202–1(e).

*Cheetham v. CSX Transp.*, 2012 WL 1424168, at \*7, \*8 (M.D. Fla.) (Slip Copy) [Emphasis added.] (LF 205-207) (A066-A068)

*Cheetham* dealt with a situation in which both federal income taxes and RRTA taxes were due on an award for lost wages under the FMLA. In the instant case, it is undisputed that the award of damages under the FELA is **not** subject to income taxes. However, there is abundant authority, as set forth herein and in BNSF’s Response to Plaintiff’s Motion for Judgment on Supersedeas Bond, that demonstrates that the judgment under the FELA is deemed payment for lost wages and is subject to RRB and Medicare taxes. The holding in *Cheetham* still applies to the obligation of the employer under the RRTA to withhold and pay the RRB and Medicare taxes due on the judgment under the FELA. If BNSF had failed to withhold and pay the employee’s portion of RRB and Medicare taxes, it could still be liable for the payment of taxes due. Even if the taxes were paid by the employee, BNSF and the individuals responsible could still be held liable for civil and criminal penalties, including a penalty equal to the amount that should have been withheld and paid over. 26 U.S.C. §§6672, 7202 and 7203.

In *Cheetham*, supra, the court denied plaintiff's motion for a Writ of Execution for the entire judgment and allowed defendant to withhold taxes from the judgment:

Permitting Defendant to withhold taxes ensures Defendant will not be held liable to the IRS for Plaintiff's failure to pay and leaves Plaintiff "not without recourse, either as to the fact or the amount of the income tax withheld." *Rivera*, 430 F.3d at 1260.

*Cheetham v. CSX Transp.*, 2012 WL 1424168, at \*8 (M.D. Fla.) (Slip Copy) (LF 206) (A067)

As in *Cheetham*, Mickey is not without recourse as to the \$12,820.80 withheld and paid into the U.S. Treasury. Despite clear authority to the contrary, if Mickey still believed that the RRB and Medicare taxes were not payable on the amount of the judgment, he could seek a refund of the tax from the IRS.

There is additional authority regarding the withholding and payment of taxes due on judgments. In the recent case of *Noel v. New York State Office of Mental Health Cent. New York Psychiatric Ctr.*, 697 F.3d 209 (2nd Cir. 2012) the Second Circuit held that payments pursuant to Title VII judgments for back and front pay were wages as defined under the Internal Revenue Code and employers are required to withhold income and Federal Insurance Contributions Act (FICA) taxes. In *Noel*, the state sought to satisfy judgment by tendering a check directly to plaintiff with income and FICA taxes withheld and paid. Plaintiff objected and sought to collect the amount of taxes withheld and paid on his behalf. The district court awarded plaintiff the amount of taxes withheld and paid. Defendant appealed, arguing that the tax code required withholding and payment of the

taxes and that allowing plaintiff to collect twice would result in a windfall to plaintiff. The Second Circuit agreed, noting that the defendant was required to withhold and pay taxes on the judgment and was subject to penalties and personal liability if it failed to do so:

Here, the district court awarded a double benefit to Noel, ordering the State to pay directly to him amounts already paid on his behalf in satisfaction of his tax liabilities. As noted, the judgment reflected wages subject to mandatory withholding, and the failure to withhold can generate significant penalties as well as personal liability. The withheld taxes were not retained by the State but were paid over for Noel's benefit. The district court's requirement that the State again pay that amount to Noel constituted an inappropriate hit to the public fisc and an undeserved windfall to him. In other words, the State paid too steep a penalty for what occurred.

*Noel v. New York State Office of Mental Health Cent. New York Psychiatric Ctr.*, 697 F.3d 209 (2nd Cir. 2012) [Footnote omitted.]

The circumstances surrounding withholding of taxes and a check sent directly to the plaintiff in *Noel* did not occur in *Mickey*. (BNSF conferred with Mickey's counsel regarding the basis for the withholding of the employee's portion of RRB and Medicare taxes and presented a check to plaintiff's counsel with correspondence explaining the basis for the withholding.) However, the ruling is instructive. The Second Court held in *Noel* that the judgment for back and front pay under Title VII was taxable and that, as an employer, the State was required to withhold and pay the employee's portion of taxes due

from the judgment. See also, *Gerstenbluth v. Credit Suisse Securities (USA) LLC*, Slip Copy, 2012 WL 4511632 (E.D.N.Y.) (District court concluded that settlement payment in age discrimination claim was considered “wages” and was subject to FICA tax withholding.)

Should BNSF not withhold the taxes and remit them to the U.S. Treasury, it could face civil and criminal penalties. 26 U.S.C. §§6672, 7202 and 7203. The tax laws and regulations provide for withholding to facilitate payment and provide protection to the employer who complies with withholding requirements. (It should be noted that if plaintiff were to collect the amount of \$12,820.80, the employee’s portion of RRB and Medicare taxes, after it has already been withheld and paid by BNSF, plaintiff would have to report the amount of \$12,820.80 as income.)

There is no windfall to the employer by virtue of complying with federal law and remitting taxes due on the judgment. It costs BNSF additional money because it must pay its taxes as well. The only windfall is to Mickey who had his RRB and Medicare taxes withheld from the judgment and paid on his behalf and then obtained judgment against the surety for those same taxes BNSF had already withheld and paid on his behalf. This is in addition to being credited with service months for Railroad Retirement purposes.

If the judgment against the surety is affirmed in this case, Mickey will recover the amount of RRB and Medicare taxes **twice**. Ironically, Mickey would then have to report this windfall as income and pay income taxes on the \$12,820.80. BNSF already withheld this amount in the RRB and Medicare taxes and paid them to the U.S. Treasury. Mickey will have recovered the \$12,820.80 again from the surety. The surety was not obliged to



pay again what was already paid once. Once is enough. As BNSF had no further obligation to Mickey, so also Safeco. The judgment of the trial court must be reversed.

**E. BNSF did not, and could not, waive its obligation as a railroad employer subject to the RRTA and IRC to withhold and pay the employee's portion of RRB and Medicare taxes by failing to request a non-MAI jury instruction or a non-MAI special verdict form or, by failing to seek modification of the verdict before entry of judgment to include a specific amount of lost wages, all of which were contrary to Missouri law and unnecessary under federal tax law.**

The Missouri Court of Appeals has implied that BNSF somehow waived its obligation to withhold and pay the employee's portion of RRB and Medicare taxes under the RRTA by failing to tender a non-MAI jury instruction to the court for submission to the jury, by failing to request a special verdict form contrary to Missouri law, or by failing to seek modification of the verdict before entry of judgment to include a specific amount of lost wages. **However, BNSF did not have the burden or obligation to request a non-MAI instruction or verdict form for use in FELA cases that included lost wages, or request a non-MAI instruction, or seek to modify the judgment.**

Furthermore, BNSF's failure to do so does not relieve BNSF of the requirement to withhold and remit federally required tax payments to the U.S. Treasury. In fact, these suggestions, proposed after the fact, are contrary to Missouri law, which requires a general verdict. §510.230 RSMo; Rule 71.02, MRCP; *Robinson v. Southwestern Bell Tel.*

*Co.*, 434 S.W.2d 249 (Mo.App. 1968). **Furthermore, to suggest that the trial court would entertain giving a non-MAI instruction or a non-MAI verdict form in a FELA case in which instructions are specified, which would create presumed error, is not realistic.** Moreover, the RRA, specifically 45 U.S.C. §231(h)(2), applies even when there is a general verdict as required under Missouri law.

When damages for lost wages are specified on the verdict form or set forth in response to special interrogatories, neither of which is permitted under the MAI, only those damages listed as lost wages are subject to RRB and Medicare taxes. When there are general verdicts with evidence of lost wages at trial, the entire verdict is deemed pay for time lost under the RRA and subject to RRB and Medicare taxes. 45 U.S.C. §231(h)(2) . Federal tax law operates independently and takes into account the variety of verdict formats under state procedural law. The form of verdict under state law does not defeat operation of the RRTA or other applicable federal tax law. Federal tax law applies whether there is a special verdict form or a general verdict. In this context, federal substantive law preempts any state law which purports to preclude the requirement that taxes be withheld and remitted to the U.S. Treasury.

In fact, BNSF's obligation to withhold the employee's RRB and Medicare taxes applies even without a tax assessment or lien. The taxable event is the satisfaction of judgment. **Defendant is required to withhold and pay the employee's portion of RRB and Medicare taxes upon payment of the judgment** and to pay the employer's portion of RRB and Medicare taxes in addition to the judgment. This obligation arises by operation of federal law upon satisfaction of judgment. There is no assessment of taxes

unless the tax is unpaid. There is no tax lien unless the tax is unpaid. In addition, **the tax due cannot be determined until the judgment has to be satisfied because the tax rate to be applied is the tax rate in effect when the judgment is satisfied.** RRB Information Notice, May 2011, Railroad Retirement Service Credits and Pay for Time Lost. (LF 112-115) (A048-A051)

Withholding the employee's portion of RRB and Medicare taxes is the same as the withholding of payroll taxes every payday. The primary obligation is for the employer to **withhold and pay** the employee's portion of the RRB and Medicare taxes. Assessments and liens arise only when there is no payment of the RRB and Medicare taxes.

As a practical matter, any assessment or lien on the judgment would be extremely unlikely and unnecessary. The IRS would simply collect the employee's portion of unpaid RRB and Medicare taxes from the railroad. As an employer, the railroad is liable for payment of the employee's portion of RRB and Medicare taxes even if the employee's portion of taxes are not withheld. **Failure to withhold subjects the employer to enforcement, including civil and criminal penalties in addition to the amount of taxes. 26 U.S.C. §§6672, 7202, and 7203.**

Nor can there be any assertion that the IRS waived any right to collect the employee's portion of the RRB and Medicare taxes due on the judgment because it failed assess any taxes or to assert a lien on the judgment. The law requires the employer to withhold and pay the employee's portion of RRB and Medicare taxes upon satisfaction of judgment. The taxable event is the payment of the judgment. There can be no assessment of lien unless the tax is unpaid. The employer's withholding and payment of taxes is the

primary means of collection of the taxes. The lack of an assessment or lien by the IRS does not indicate that the employer is not required to withhold and pay the employee's portion of the tax. Further, the lack of an assessment or lien by the IRS does not indicate a waiver by the IRS of its right to collect the tax. Rather, it indicates a reliance by the IRS on the primary means of collecting the employee's portion of RRB and Medicare taxes – the employer's obligation under the law to withhold and pay the taxes.

There are specific provisions for both enforcing and challenging tax laws. If the employee disputes his RRB and Medicare tax obligations, he cannot seek recovery from the employer of the RRB and Medicare taxes the employer is required to withhold and pay to the U.S. Treasury. Under 26 U.S.C. §3202(b) the employer is indemnified for taxes withheld and paid pursuant to the RRTA. Likewise, under 26 U.S.C. §3102(b) the employer is indemnified for withholding and payment of Medicare taxes. The taxes must first be paid and then the employee may seek a refund from the IRS. The IRS does not waive any right to collect these taxes by requiring withholding and payment by the employer under the law. Nor did the IRS waive any right to collect the taxes by refusing to waive sovereign immunity to participate in the previously filed interpleader action.

**The IRS relied on the employer withholding and payment obligations to collect the employee portion of RRB and Medicare taxes due on the judgment.**

Under the RRA, a payment with respect to personal injuries that includes pay for time lost is subject to RRB and Medicare taxes unless there is specific apportionment to other factors at the time of payment. 45 U.S.C. §231(h)(2). Without an apportionment or a specific amount awarded for wage loss, the entire payment or amount awarded is

deemed to be for time lost and taxable. **Accordingly, under federal law a general verdict is deemed to be pay for time lost and taxable unless there is allocation to other factors at the time of satisfaction of judgment. 45 U.S.C. §231(h)(2).**

The holding of the courts below places Missouri law in conflict with federal law. To the extent that there is a conflict between Missouri law and the federal statute, the federal law preempts the state law. *See, Connelly v. Iolab Corp.*, 927 S.W.2d 848, 851 (Mo. banc 1966). The preemption doctrine has its roots in the Supremacy Clause of the United States Constitution, Art. VI, cl. 2. Federal laws enacted by Congress preempt state laws that conflict with federal law. *See, McCulloch v. Maryland*, 17 U.S. 316, 327-33 (1819); *see also, Transmission Agency of California v. Sierra Pacific Power Co.*, 295 F.3d 918, 928 (9th Cir. 2002).

The United States has set forth its interpretation of the pertinent statutes and regulation in the amicus brief filed with the Missouri Court of Appeals and now sent to this Court as part of the record. *See, Brief of the United States as Amicus Curiae in Support of Appellant and in Support of Reversal*. Its interpretation of RRB and Medicare tax laws and regulations is authoritative and entitled to deference. Its interpretation is consistent with prior interpretations involving employment taxes in other cases. *Chase Bank USA, N.A. v. McCoy*, 131 S.Ct. 871 (2011). This Court need look no further than the U.S. amicus brief for the proper interpretation of statutes and regulations involved in RRB and Medicare taxation. The U.S. has also set forth a complete discussion of the preemption issues raised by the Circuit Court's holding in this case. To the extent that the holding of the courts below conflicts with federal law, it is preempted by federal law.

Judgment in this FELA case was satisfied by BNSF's payment of the judgment to the plaintiff along with the withholding and payment of plaintiff's portion of RRB and Medicare taxes due on the judgment to the U.S. Treasury as required by federal law.

**F. Conclusion: Plaintiff's Motion for Judgment on the Supersedeas Bond was improper and the Order and Judgment of May 24, 2012 should be reversed with instructions to enter an Order showing satisfaction of judgment. Plaintiff has nothing left to collect as defendant withheld and paid RRB and Medicare taxes as required by law and the surety is not obligated to pay what defendant does not owe.**

In the instant case, the judgment under the FELA is not considered income under the Internal Revenue Code, but the entire amount of the judgment is considered pay for time lost under the RRTA. Accordingly, as an employer under the RRTA, BNSF was required to and did withhold and pay the employee's portion of RRB Tier 1 and Tier 2 taxes and Medicare taxes from the judgment. BNSF would have faced penalties and personal responsibility for failure to withhold and pay these taxes.

BNSF has no further obligation to satisfy judgment as it has paid to Mickey all but the amount of \$12,820.80, which was the employee's portion of RRB and Medicare taxes withheld from the amount of judgment and paid to the U.S. Treasury. If Mickey still disputes that he does not owe the employee's portion of RRB and Medicare taxes due on the judgment in this case, he can seek a refund from the IRS of those amounts withheld and paid on his behalf. Mickey cannot pursue BNSF for the employee's portion of RRB

and Medicare taxes on the judgment – taxes that Mickey owed and BNSF was obligated to withhold and pay. Pursuant to federal law and regulations, BNSF properly reported the judgment and all taxes due and withheld and paid the employee's portion of taxes on the judgment to the U.S. Treasury. BNSF has nothing left for Mickey to collect. Mickey cannot collect from the surety on the supersedeas bond as BNSF has fully satisfied the judgment by payment of judgment, costs and interest to plaintiff and the payment of the employee's portion RRB and Medicare taxes due on the judgment to the U.S. Treasury.

Any dispute Mickey may have over withholding and payment of RRB and Medicare taxes from the judgment is with the IRS and not with defendant. By allowing judgment against the surety for \$12,820.80, the employee's portion of RRB and Medicare taxes, the trial court gave a windfall to plaintiff and allowed plaintiff to collect the amount of taxes twice.

Throughout his brief and argument to the court of appeals, plaintiff asserted that defendant somehow waived its obligation under federal law to withhold and pay the employee's portion of RRB and Medicare taxes from the judgment. Yet, plaintiff maintains that he does not owe these taxes at all. Plaintiff's tax dispute should be taken up with the IRS.

Accordingly, BNSF and Safeco request that this Court reverse the trial court's Order and Judgment of May 24, 2012 and remand this case with instructions to the trial court to modify the Order to show that judgment has been satisfied as \$12,820.80, the employee's portion of RRB and Medicare taxes, was withheld and paid to the U.S. Treasury in compliance with federal law and regulations.

## CONCLUSION

For all of the foregoing reasons, the Order and Judgment of May 24, 2012, should be reversed with judgment against Safeco vacated and the case remanded with instructions for the trial court to deny Plaintiff's Motion for Judgment on the Supersedeas Bond and for the trial court to enter a full satisfaction of judgment, acknowledging payment of the judgment with costs and interest to plaintiff and with the remittance of \$12,820.80 as the employee's portion of Railroad Retirement taxes and Medicare taxes to the U.S. Treasury.

Respectfully submitted,

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**Dated:** November 1, 2013



### **Certificate of Compliance**

The undersigned hereby certifies that:

1. This brief complies with the information required by Rule 55.03.
2. This brief complies with the limitations contained in Rule 84.06(b).
3. Per Rule 84.06(c), the word count of this brief is 11,766, as determined by Microsoft Word 2003.
4. The brief was prepared using “Times New Roman” font in 13 point size, in Microsoft Word 2003.

/s/ Thomas P. McDermott

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### **Certificate of Service**

The undersigned hereby certifies that a copy of Appellants' Substitute Brief was filed electronically and served by operation of the electronic filing service, on this 1st day of November, 2013, to each of the individuals set forth below:

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